United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

950

No. 23,589

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED VAN LINES, INC.,

Plaintiff-Appellee

v.

UNITED STATES OF AMERICA,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLANT

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STATEMENT OF THE ISSUES PRESENTED

Under a government bill of lading appellee, United Van Lines, Inc. (United), contracted to pack and transport a military officer's household goods to Huntsville, Alabama, to store the goods for not over 90 days at that destination and, within that period, to deliver them to the consignee. Appellee delivered the goods into storage at the destination, where they were destroyed by fire in the warehouse. The questions presented are:

1. Whether the government is liable to United for packing and transport of the goods to the warehouse, despite the failure to deliver to the consignee.

2. Whether the government, in deducting as an overcharge the amount paid United for packing and transport from amounts owed United on other freight bills, exceeded its statutory powers and imposed on appellee a liability greater than its carrier liability for lost or damaged goods.

REFERENCES TO RULINGS

This case has not previously been before this Court.

The district court's Order Granting Summary Judgment, issued on June 3, 1969, is reproduced in the Joint Appendix at page 88a.[1/]

STATEMENT OF THE CASE

Appellee, United Van Lines, Inc., is a common carrier of property by motor vehicle operating in interstate commerce (JA 3a).[2/] Under a government bill of lading executed by the transportation officer at Wright-Patterson Air Force Base, United undertook to pack and transport the household goods of Air Force Lieutenant George P. Roys from Dayton, Ohio, to Huntsville, Alabama. The bill of lading named United as the carrier and Lt. Roys as the consignee. The bill also called for storage of the goods, not to exceed 90 days, at the destination and delivery to the consignee. The bill conditioned payment

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1/ The district judge also discussed orally his reasons for granting plaintiff's motion for summary judgment. Through oversight, neither party ordered a transcription of the judge's remarks when the appeal was docketed. Appellant has now ordered a transcript, which will be certified to this Court, with a copy to opposing counsel, as soon as it is available.

2/ "JA" refers to the Joint Appendix.

on its presentation, "properly accomplished". (JA 6a-8a, 31a-32a). As required, United filed a certificate of liability under which it assumed full carrier liability for the goods during the period of storage and until delivery to the consignee (JA 21a).

United packed, transported and delivered the goods to the Huntsville Moving and Storage Company at Huntsville, Alabama, for storage until delivery to the consignee. An agent of the storage company signed the consignee's receipt contained in the carrier's own bill of lading which it had issued. This receipt acknowledged performance of the services ordered and receipt of the shipment in good condition. But neither Lt. Roys nor the agent signed the government bill of lading (JA 4a, 7a-8a, 13a, 14a). Shortly after delivery of the goods into storage they were destroyed by a fire on the premises of the Huntsville Moving and Storage Company (JA 4a, 8a). As it had contracted to do, United paid the Lieutenant the amount due for his loss (JA 11a, 25a).[3/]

Without mentioning that the goods had been destroyed by fire before being delivered to the consignee, United filed a claim with the Finance Center, United States Army for $549.28 for the packing and transport services performed (JA 4a, 8a).

3/ Under the Military Tariff Rates in force at the time of the shipment, the carrier liability for loss or damage to goods was limited to 30¢ per pound per article (JA 61a). United paid Lieutenant Roys $1,926, presumably based on this rate.

This claim was promptly paid in full. But a few months later, upon discovering that the goods had not been delivered to the consignee, the General Accounting Office demanded the refund, as an overcharge, of the amount it had paid United. United protested and the amount was deducted from payments due it on other freight bills (JA 4a-5a, 11a, 25a).

United then filed this suit under the Tucker Act, 28 U.S.C. 1346(a)(2), in the United States District Court for the District of Columbia, seeking $549.28 for the packing and transportation services it had performed, plus interest and costs (JA 3a-5a). The district court (Gesell, J.), concluding that there was no genuine issue as to any material fact and that United was entitled to judgment as a matter of law, granted United's motion for summary judgment (JA 88a). This appeal followed (JA 89a).

STATUTES AND REGULATION INVOLVED

The applicable regulation, 4 C.F.R. 52.30 (1961 ed.), and the relevant sections of the Interstate Commerce Act, 49 U.S.C. 20(11) and 66 (1964 ed.), are reproduced in the Statutory Appendix, infra at 1b-3b.

ARGUMENT

I

BY AN ESTABLISHED PRINCIPLE OF TRANSPORTATION LAW, A COMMON CARRIER IS NOT ENTITLED TO FREIGHT CHARGES UNTIL IT DELIVERS THE GOODS TO THE CONSIGNEE AT THE DESTINATION, ABSENT AN EXPRESSED CONTRARY INTENT. IN THIS CASE NO CONTRARY INTENT WAS EXPRESSED IN THE BILL OF LADING OR THE APPLICABLE REGULATION.

A. The General Rule.

It is a general rule of transportation law, established at common law, that, in the absence of a special agreement to the contrary, freight charges become payable only on those goods that have been shipped and delivered. Christie v. Davis Coal & Coke Co., 95 F. 837, 838 (S.D. N.Y. 1899), affirmed, 110 F. 1006 (C.A. 2, 1901); Brittan v. Barnaby, 62 U.S. (21 How.) 527, 533 (1858); Southern Pacific Co. v. United States, 67 Ct. Cl. 414, 420 (1929), certiorari denied, 280 U.S. 567; Baggett Transportation Co. v. United States, 319 F. 2d 864, 868 (Ct. Cl. 1963); 13 Am. Jur. 2d Carriers sec. 462; 13 C.J.S. Carriers sec. 317. Delivery must be to the "door of the consignee" and "is complete when there is nothing left to be done to finish the transportation." Loveless Mfg. Co. v. Roadway Exp., Inc., 104 F. Supp. 809, 812 (N.D. Okla., 1952). And, as stated in Christie v. Davis Coal & Coke Co., supra (95 F. at 838-39):

> The presumption that freight is payable only upon cargo delivered rests therefore upon equitable grounds; and this equitable presumption ought to prevail, unless the contract of the parties expresses a contrary intent with reasonable clearness and certainty.

B. No Intent Contrary to the General Rule Was Expressed in This Case.

Neither in the contract of carriage -- here, a standard-form government bill of lading -- nor in the applicable regulation is there expressed any intent contrary to this general rule requiring delivery of the goods to the consignee before freight charges are payable.

1. Contract of carriage.

The terms and conditions of the standard-form government bill of lading used in this case clearly establish that the parties intended to incorporate the general rule into their contract of carriage and to be bound by it. On the front of the bill in large type is stated the following term (JA 31a):

> RECEIVED BY THE TRANSPORTATION COMPANY NAMED ABOVE, SUBJECT TO CONDITIONS NAMED ON THE REVERSE HEREOF, THE PROPERTY HEREINAFTER DESCRIBED, IN APPARENT GOOD ORDER AND CONDITION (CONTENTS AND VALUE UNKNOWN), TO BE FORWARDED TO DESTINATION BY THE SAID COMPANY AND CONNECTING LINES, THERE TO BE DELIVERED IN LIKE ORDER AND CONDITION TO SAID CONSIGNEE. (Emphasis supplied.)

Among the general conditions and instructions printed on the reverse side of the bill are the following (JA 32a):

> CONDITIONS
>
> It is mutually agreed and understood between the United States and carriers who are parties to this bill of lading that--
>
> 1. Prepayment of charges shall in no case be demanded by carrier, nor shall collection be made from consignee. On presentation of this bill of lading, properly accomplished and attached to freight voucher prepared on the authorized Government form, to the office indicated on the face hereof, payment will be made to the last carrier, unless otherwise specifically stipulated.
>
> * * * * *

INSTRUCTIONS

* * * * *

2. * * * The consignee, on receipt on the shipment, will sign the consignee's certificate on the original bill of lading and surrender the bill of lading to the last carrier. The original bill of lading then becomes the evidence upon which settlement for the service will be made.

3. The consignee's certificate of delivery shall be accomplished by the consignee or other duly authorized person.

* * * * *

(Emphasis supplied.)

In addition to these terms and conditions printed on the standard-form bill, there are typed on the bill the following: "Date delivered into SIT_____" (storage in transit) and "Date delivered into Res_____" (residence). (JA 31a).

These terms and conditions direct United to deliver the goods to the consignee and provide for the payment of freight and other charges only upon presentation of the bill of lading, "properly accomplished" -- i.e., signed by the consignee on his receipt of the goods. Under the terms of the contract of carriage, by which it is bound, United is not entitled to payment of the packing and freight charges, because it has not delivered the goods to the consignee.

2. Applicable regulation.

The applicable regulation, 4 C.F.R. 52.30 (1961 ed.), promulgated by the General Accounting Office, does not change the carrier's duty, under both the general rule and the terms of the contract of carriage, to deliver the goods to the consignee before seeking payment for its services. This regulation contains

instructions applicable "only to shipments of household goods for the Department of Defense" (4 C.F.R. 52.30(a) (1961 ed.), which permit payment for freight services before delivery to the consignee provided the carrier continues to assume full responsibility for those goods until their delivery to the consignee. The regulation, in pertinent part, provides:

> (c) Required certifications. The payment of transportation charges from the point of shipment to the destination storage point on shipments of household goods * * * may be made upon completion of the transportation to the carrier's destination point and prior to ultimate delivery to the consignee: Provided, The carrier hauling the shipment to the destination storage point certifies on the covering Government bill of lading * * *:
>
> (1) That the described household goods were placed in the Carrier's storage warehouse at _____ (Destination warehouse) on _____ (Date);
>
> (2) That such household goods will be permitted to remain there for a period _____ (Number of days) or such shorter period as may meet the consignee's or owners demands; and
>
> (3) That the carrier(s) hauling the shipment to the destination storage point assumes full carrier liability for the shipment during such storage and until delivery to the consignee or owner within the designated storage period.
>
> * * * * *
>
> (d) Supplemental billing for accessorial charges. When transportation charges have been paid as authorized in the preceding paragraph, the payment of accessorial charges, if any, accruing against the shipment after delivery into storage may be made upon presentation by the motor carrier of a claim therefor on SF 1113, which should bear the same bill number as the carrier's original bill for transportation charges but carrying a letter suffix * * *. The claims for accessorial charges must identify the bill of lading covering the transportation service, show

the basis for the accessorial charges claimed, and be supported by a statement of the following information signed by the consignee, showing:

(1) Accessorial services ordered and furnished;

(2) Receipt of the shipment by the consignee or owner; and

(3) Loss or damage to the shipment, if any.

The proviso in subsection (c) of the regulation establishes that United continues to be responsible for delivery of the goods to the consignee. Subsection (d) merely provides a means, alternative to presentation of the original bill of lading required by condition 1 of the government bill, by which payment can be obtained for the accessorial services -- here, the storage at the Huntsville Moving and Storage Company for not over 90 days and the final delivery, out of such storage, to the consignee's residence. It is clear that United, by taking advantage of the regulation to obtain payment for the packing and freight charges prior to delivery out of storage to the consignee, is not relieved of its responsibility for such delivery to the consignee.

C. The Government, Not United, Is Entitled to Judgment As a Matter of Law.

Under the general rule of transportation law, which is applicable to this case, the government is not liable to United for the packing and freight charges it seeks to recover, because United has not performed its contractual duty to deliver the goods to the consignee. Through its series of arguments in the district court, United sought to show that the intent of the parties, as expressed in the standard-form government bill of lading and the applicable regulation, was contrary to the general rule. Those arguments are specious.

United first argued that the contract of carriage, acknowledged to be the government bill of lading (JA 44a), called for the performance of two distinct services -- (1) packing and transportation of goods from Dayton to Huntsville; and (2) storage of the goods at the destination, not to exceed 90 days, and delivery to the consignee (JA 44a-46a).[4/] United apparently bases this argument on the inclusion in the bill of lading of the term "SIT auth at dest not to excedd [sic] 90 days." (JA 31a, 46a). But this term does not relieve United, as the only carrier named on the bill, of its responsibility for the delivery of the goods to the residence of the consignee, after it has placed them into storage. As discussed above, supra, pp. 6-7, the terms and conditions printed on the bill call for such delivery to the consignee; requiring United to perform an additional service, for which it was to be paid, cannot reasonably be interpreted as altering its duty to deliver the goods to the consignee.

United sought to bolster its position by arguing that the bill did not require delivery to the consignee for its "proper accomplishment", but called for delivery into storage. Citing

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4/ United also argued that the storage and final delivery services were provided for the "convenience and benefit" of the government, in that their purpose is to give transferred military personnel time to secure living quarters before receiving their household goods, that their performance was contingent on the government's future instructions, and that it would not have performed them, but would have delivered the goods to the consignee immediately upon arrival at the destination, had they not been requested (JA 46a). The reply to this contention is that the government contracted for such services along with the packing and transportation services, and that United receives benefit, in the form of monetary payments, for performing them.

Alcoa Steamship Co. v. United States, 338 U.S. 421 (1949), Strickland Transportation Co. v. United States, 223 F. 2d 466 (C.A. 5 1955), and National Trailer Convoy, Inc. v. United States, 345 F. 2d 573 (Ct. Cl. 1965), United contended that, in those cases, the "proper accomplishment" of the government bills was conditioned on delivery of the goods to the consignee, whereas the bill here, rather than conditioning its "proper accomplishment" on such a delivery, "specifically instructs the carrier not to deliver to the consignee". Based on this reasoning, United concluded that accomplishment of the bill by the consignee's signature was not intended by the parties (JA 48a-51a).

The cases which United sought to rely on -- Alcoa, Strickland, and National Trailer, supra -- all hold that the government was not liable for freight charges, on the ground that there was no "proper accomplishment" of the government bills of lading by signature of the consignee showing his receipt of the goods, when the goods were lost or destroyed while in transit. It is true, as United argued, that the bills of lading in those cases did not call for storage in transit at the destination, as does the bill here. But the holdings in those cases are based on conditions and instructions on the bills of lading which are identical to those on the bill here (discussed supra pp. 6-7). And on the basis of these same conditions and instructions, the three cases hold that delivery to the consignee was necessary for the "proper accomplishment" of the bill and was a precondition to the government's liability for freight

charges. This construction of the contract of carriage is equally applicable here. The only difference between the present case and the three cases is that here the goods were destroyed while in storage and not while in transit; in all four cases the goods were destroyed while in the possession of the carrier or, as here, the carrier's subcontractor or agent. There is no reason to believe that the government intended to change the meaning of the contract terms requiring delivery to the consignee merely by adding "storage in transit at destination not to exceed 90 days" to the other services to be performed by United.

United sought further to support its position by arguing that the applicable regulation, 4 C.F.R. 52.30 (1961 ed.), contemplates the filing of separate claims for two sets of services -- those for packing and transportation to be filed upon delivery of the goods into storage, and those for storage and delivery to the consignee to be filed after such delivery is made -- and "requires" the surrender of the original bill of lading as a precondition to obtaining payment for the packing and transport services (JA 46a-48a, 51a-52a). Therefore, it contended, the "proper accomplishment" of the bill of lading could not have been intended to be by delivery of the goods into the residence of the consignee and procuring the consignee's signature on the bill; rather, proper accomplishment of the bill was intended to be by delivery of the goods into storage (JA 50a-52a).

No changes in the contractual duties of carriers transporting goods under government bills of lading were intended to be effected by this regulation. As shown above, supra pp. 7-9 , the instructions contained in the applicable regulation are permissive only, and permit payment for freight services before delivery to the consignee provided the carrier continues to assume full responsibility for those goods until their delivery to the consignee. It is this proviso, contained in subsection (c) of the regulation, 4 C.F.R. 52.30(c) (1961 ed.), which clearly establishes that the carrier continues to be responsible for delivery of the goods to the consignee. If the carrier decides to take advantage of the regulation and obtain advance payment, then it is to surrender the original bill of lading, to which it has affixed its certification that it continues to be responsible for the goods until their delivery to the consignee. To obtain payment for other charges -- e.g., as here, storage for a period and delivery out of storage into the consignee's residence -- the regulation allows the carrier to present its claim on a supplemental billing form, identifying the original bill of lading, and supported by a statement signed by the consignee showing, among other things, his receipt of the shipment. Therefore, United's argument that this permissive regulation changes the terms of the contract by which it is bound is without merit. The regulation was simply a device whereby United could obtain payment for its packing and freight services prior to delivery of the goods to the consignee; the regulation was

not designed to change the substantive obligation of United to deliver the goods to the consignee. 5/

In order to be entitled to the recovery of the packing and freight charges sought in this case, United must show that the contract of carriage expresses, "with reasonable clearness and certainty", an intent contrary to the general rule that freight charges are earned on delivery of the goods to the consignee. Christie v. Davis Coal & Coke Co., supra; United States v. Waterman Steamship Corp., 397 F. 2d 577, 579 (C.A. 5 1968). United failed to discharge this burden through its arguments in the district court and, indeed, it cannot discharge this burden, for the government bill of lading incorporates the general rule and binds United to its requirements. United's argument that the applicable regulation evidences a government intent to relieve carriers under government bills of lading of their duty to deliver their shipments to the consignee also must fail. Not

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5/ In order to counter the government's argument that the regulation does not affect the terms of the contract of carriage, but merely permits the advance conditional payment of freight charges, United argued that both condition 1 of the bill of lading and 31 U.S.C. 529 (1964 ed.) prohibit advance payment for any service rendered to the government and that the latter provided that payment shall not exceed the value of the services rendered (JA 76a-77a). 31 U.S.C. 529 provides in part that:

> No advance of public money shall be made in any case unless authorized by the appropriation concerned or other law. And in all cases of contracts for the performance of any service, or the delivery of articles of any description, for the use of the United States, payment shall not exceed the value of the service rendered, or of the articles delivered previously to such payment. * * *

[Continued]

only is that regulation, by its terms, permissive, but also, in order for carriers to receive the benefits it affords, which otherwise they would not be able to obtain under the terms of government bills of lading, they must certify their continuing responsibility for the delivery of the goods to the consignee. Neither the contract of carriage nor the applicable regulation, then, expresses an intent contrary to the general rule; rather, the clear intent expressed in both is that the general rule governs the conduct of the parties under the contract. And under that general rule United is not entitled to the recovery of the packing and freight charges, because it has not delivered the goods to the consignee. Therefore, the judgment of the district court for the appellee carrier is erroneous as a matter of law.

II

THE GOVERNMENT HAS A CLEAR RIGHT OF SET-OFF, BOTH STATUTORY AND AT COMMON LAW: HENCE, THE GENERAL ACCOUNTING OFFICE COULD SET OFF THE AMOUNT PAID UNITED UPON DISCOVERING THAT SUCH AMOUNT WAS NOT DUE.

In the district court United argued that, in deducting the amount paid on this contract from amounts due on other freight

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5/ [Continued]
Condition 1 of the bill of lading is similar, providing that "Prepayment of charges shall in no case be demanded by carrier * * *." (JA 32a). As shown above, the regulation, 4 C.F.R. 52.30 (1961 ed.), permits what is, in effect, a progress payment for work already performed to date. This, of course; comports with both condition 1 of the bill of lading and 31 U.S.C. 529, which allows payment in cases of contracts for the performance of services not to exceed the value of the service rendered. Furthermore, 49 U.S.C. 66 authorizes the payment for transportation of government property by a common carrier on presentation of the bill.

bills, the government exceeded its statutory authority and imposed on United a liability greater than its carrier liability for lost or damaged goods, in violation of the contract terms and the Interstate Commerce Act, 49 U.S.C. 20(11) and 66 (1964 ed.). In this connection, United noted that it had contracted with the government to haul the Lieutenant's goods at a reduced rate and received in return a limit on its carrier's liability of 30¢ per pound per article, which it permitted by the Interstate Commerce Act, 49 U.S.C. 20(11). It argued that the government's deduction of the amount already paid it for packing and hauling the goods from amounts due it on other freight bills works to increase its carrier's liability, thereby imposing on it a liability greater than the limit specified in the contract. It further argued that the amount deducted does not fall within the narrowly-defined "overcharges" which the government may deduct under the Interstate Commerce Act, 49 U.S.C. 66 (JA 52a-55a). These arguments of United are without merit.

First, Alcoa Steamship Co. v. United States, 338 U.S. 421, Strickland Transportation Co. v. United States, 223 F. 2d 466 (C.A. 5), and National Trailer Convoy, Inc. v. United States, 345 F. 2d 573 (Ct. Cl.), discussed supra pp. 11-12 , establish that a common carrier's liability for the value of the goods lost prior to delivery to the consignee is distinct from the shipper's liability for freight charges, the latter being controlled by the contractual terms of the bill of lading. The limit on United's liability to the consignee for the destroyed goods, therefore, has no bearing on the government's liability for the

packing and transport charges. Under the general rule of transportation law, applicable to this case, United must deliver the goods to the consignee before it is entitled to payment of the packing and freight charges.

Second, the government's statutory right of set-off is provided by the Interstate Commerce Act, 49 U.S.C. 66:

> Payment for transportation of the United States mail and of persons or property for or on behalf of the United States by any common carrier subject to the Interstate Commerce Act, as amended * * * shall be made upon presentation of bills therefor, prior to audit or settlement by the General Accounting Office, but the right is reserved to the United States Government to deduct the amount of any overcharges by any such carrier from any amount subsequently found to be due such carrier. The term "overcharges" shall be deemed to mean charges for transportation services in excess of those applicable thereto under the tariffs lawfully on file with the Interstate Commerce Commission * * * and charges in excess of those applicable thereto under rates, fares, and charges established pursuant to section 22 of this title * * *.

There is no basis for United's contention that, under the definition of "overcharges" in this statute, the government is precluded from deducting the whole amount paid for the packing and transportation services performed. Such amount was a charge "in excess" of that due. Moreover, entirely apart from the statute, the government has a common law right to set off that amount from other amounts due United. United States v. Munsey Trust Co., 332 U.S. 234, 238-40; Barry v. United States, 229 U.S. 47, 53; Seaboard Surety Co. v. United States, 67 F. Supp. 969, 971 (Ct. Cl.). As the Supreme Court said in Barry v. United States, supra at 53:

> * * * The liability might have been asserted by the Government in an action; but it might, as it did, charge it up as a set-off against its own liability. It would be folly to require the Government to pay under the one contract what it must eventually recover for a breach of the other.

In this case, United's retention of the charges for the packing and freight services it collected in advance of when they were due was dependent upon its completion of the contract of carriage. United having failed to complete that contract by delivering the goods to the consignee, the government had a clear right, both under the Interstate Commerce Act, 49 U.S.C. 66 and at common law, to set off as unearned that advance payment made to United.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted,

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STATUTORY APPENDIX

STATUTORY APPENDIX

1. The applicable regulation, 4 C.F.R. 52.30 (1961 ed.) (22 F.R. 1093, Dec. 28, 1957), provides as follows:

> (a) Application. The instructions in this section relate only to shipments of household goods for the Department of Defense.
>
> (b) Carrier defined. The term "carrier" as used in this part means "motor carrier" or "freight forwarder" which has been duly authorized, under certificate or permit, to operate as such in intrastate or interstate commerce.
>
> (c) Required certifications. The payment of transportation charges from the point of shipment to the destination storage point on shipments of household goods forwarded for account of the Department of the Army, the Department of the Navy (including the Marine Corps), or the Department of the Air Force and stored in transit for account of the motor carrier and for ultimate delivery to the consignee or owner may be made upon completion of the transportation to the carrier's destination storage point and prior to ultimate delivery to the consignee: Provided, The carrier hauling the shipment to the destination storage point certifies on the covering Government bill of lading over the signature of its duly authorized representative:
>
> (1) That the described household goods were placed in the Carrier's storage warehouse at _____ (Destination) (Warehouse) on _____ (Date);
>
> (2) That such household goods will be permitted to remain there for a period of _____ (Number of Days) or such shorter period as may meet the consignee's or owner's demands; and
>
> (3) That the carrier(s) hauling the shipment to the destination storage point assumes full carrier liability for the shipment during such storage and until delivery to the consignee or owner within the designated storage period.
>
> If space on the Government bill of lading is not available, this certificate, with appropriate

reference to the Government bill of lading number, may be made on plain paper and securely attached to the bill of lading.

(d) Supplemental billing for accessorial charges. When transportation charges have been paid as authorized in the preceding paragraph, the payment of accessorial charges, if any, accruing against the shipment after delivery into storage may be made upon presentation by the motor carrier of a claim therefor on SF 1113, which should bear the same bill number as the carrier's original bill for transportation charges but carrying a letter suffix (example: No. 12345-A). The claims for accessorial charges must identify the bill of lading covering the transportation service, show the basis for the accessorial charges claimed, and be supported by a statement of the following information signed by the consignee, showing:

(1) Accessorial services ordered and furnished;

(2) Receipt of the shipment by the consignee or owner; and

(3) Loss or damage to the shipment, if any.

2. Section 20(11) of the Interstate Commerce Act, 49 U.S.C. 20(11) (1964 ed.), provides in pertinent part:

> Any common carrier, railroad, or transportation company subject to the provisions of this chapter receiving property for transportation from a point in one State or Territory, District of Columbia, or from any point in the United States to a point in an adjacent foreign country shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, and no contract, receipt, rule, regulation, or other limitation of any character whatsoever shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed; * * * Provided, however, That the provisions hereof respecting liability for full actual loss, damage, or injury, notwithstanding any limitation of liability or recovery or representation or agreement

> or release as to value, and declaring any such limitation to be unlawful and void, shall not apply, * * * to property, except ordinary livestock, received for transportation concerning which the carrier shall have been or shall be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property, in which case such declaration or agreement shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released, and shall not, so far as relates to values, be held to be a violation of section 10 of this title, and any tariff schedule which may be filed with the Commission pursuant to such order shall contain specific reference thereto and may establish rates varying with the value so declared and agreed upon * * *.
>
> . . .

3. Section 66 of the Interstate Commerce Act, 49 U.S.C. 66 (1964 ed.), provides in pertinent part: 6/

> Payment for transportation of the United States mail and of persons or property for or on behalf of the United States by any common carrier subject to the Interstate Commerce Act, as amended, * * * shall be made upon presentation of bills therefor, prior to audit or settlement by the General Accounting Office, but the right is reserved to the United States Government to deduct the amount of any overcharges by any such carrier from any amount subsequently found to be due such carrier. The term "overcharges" shall be deemed to mean charges in excess of those applicable thereto under the tariffs lawfully on file with the Interstate Commerce Commission * * * and charges in excess of those applicable thereto under rates, fares, and charges established pursuant to section 22 of this title * * *.

6/ The 1964 edition of the United States Code failed to include the change of wording in the first sentence of Title 49, Section 66, brought about by the 1958 amendment, Pub. L. 85-762, 72 Stat. 860, which substituted "overcharges by" for "overpayment to" and added the second sentence defining "overcharges".

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,589

UNITED VAN LINES, INC.,

Plaintiff-Appellee

v.

UNITED STATES OF AMERICA,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLEE

COUNTERSTATEMENT OF THE ISSUES PRESENTED

I

Where a common carrier transports a shipment to the destination designated in the contract of carriage and there, in compliance with the shipper's instruction in the contract, delivers the shipment into storage, may the shipper recoup the carrier's charges for the transportation when the shipment is there-

after destroyed while in storage for which loss the shipper has been indemnified by the carrier in accord with the contract and the Interstate Commerce Act.

II

Under 49 U.S.C. § 66 authorizing administrative deductions for "overcharges," may the General Accounting Office set off a carrier's lawful and applicable transportation charges as damages for a shipment destroyed after delivery, which damages exceed the liability satisfied by and imposed on the carrier by the contract of carriage and the Interstate Commerce Act.

COUNTERSTATEMENT OF THE CASE

Appellant[1] has appealed from an order of the United States District Court for the District of Columbia awarding summary judgment to Plaintiff-Appellee[2] in a suit for breach of contract under the Tucker Act, 28 U.S.C.A. § 1346, to recover motor carrier charges in the amount of $549.28.

The suit below involved the transportation by United of 6,420 pounds of household goods of an Air Force officer from Wright-Patterson Air Force Base, Dayton, Ohio to Huntsville, Alabama between December 20 and December 31, 1962. The contract

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1/ Hereinafter referred to as the "United States," the "Government," or the "GAO" (General Accounting Office).

2/ United Van Lines, Inc., hereinafter referred to as "Appellee" or "United."

of carriage governing the transportation was made on a government form bill of lading (GBL) No. B-4292042 (JA 13a, 31a, 32a). Under the terms of that bill the transportation was subject to the rates and charges contained in Military Rate Tariff 1-B published by the Household Goods Carriers' Bureau, and was to be performed subject to the released rate provision of said tariff pursuant to which the Government agreed to limit the carriers' liability for the shipment to a released value not to exceed 30 cents per pound per article (JA 61a).

The bill named Lt. George P. Roys as consignee but no mailing or other delivery address of consignee was designated, the destination being identified simply as Huntsville, Alabama. However, the face of the bill bore the typed endorsement "SIT auth at dest not to exceedd [sic] 90 days",[3/] under which the carrier was instructed and obligated, upon completion of the transportation to the designated destination, to deliver the shipment into storage to await additional instructions as to its disposition.

United picked up the shipment at point of origin on December 20, 1962, performed various packing services, and transported it to Huntsville, Alabama, and there, on December 31, 1962, delivered it to the premises of the Huntsville Moving and Storage Company, where the shipment was received and placed in storage.

3/ Translated, the abbreviated endorsement reads: "Storage-in-Transit authorized at destination not to exceed 90 days."

This is evidenced by another typewritten endorsement on the face of the GBL reading: "Date delivered into SIT 12-31-62."[4] Complying with Section 3075 of the applicable GAO Regulations entitled "Motor carrier or freight forwarder destination storage, storage-in-transit of household goods for account of the Department of Defense; payment of transportation and accessorial charges," 4 C.F.R. 52.30 (1961 ed, 22 F.R. 1093, December 28, 1957),[5] a duly authorized agent of United certified on an attached endorsement to the original of the GBL that on December 31, 1962 the shipment had been placed in storage at destination in the Huntsville warehouse; that the shipment would be permitted to remain there for 90 days or such later period as may meet the consignee's or owner's demands; and that United, as the carrier hauling the shipment to the destination storage point, assumed carrier liability for the shipment during such storage and until delivery to the consignee or owner within the designated storage period (JA 21a).

As further provided by 4 C.F.R. § 52.30 United billed the Government $549.28 for the completed transportation computed

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4/ There is no dispute that United completed the transportation required by the GBL and delivered the shipment without damage into storage as the contract required. As the Government points out, an agent of the storage company signed the consignee's receipt on the carrier bill of lading issued by United (JA 33a), and that "This receipt acknowledged performance of the services ordered and receipt of the shipment in good condition." (Gov't Br. p. 3).

5/ The text of the Regulation appears, in toto, at page 16 of the Statutory Appendix to the Government's Opening Brief.

on the basis of the applicable rate in Military Rate Tariff 1-B, and submitted therewith the GBL and the certified endorsement in support of its freight charges. On February 21, 1963 the Government paid United's charges in full as it was authorized to do under 4 C.F.R. § 52.30.

On January 13, 1963 the warehouse at Huntsville was totally destroyed by fire, resulting in the loss of Lt. Roys' shipment. On February 11, 1963 United, in satisfaction of its liability to the Government under the contract of carriage, paid Lt. Roys the sum of $1,926.00 for the loss of the shipment, which sum was determined by multiplying the released value of 30 cents per pound by 6,420 pounds, the total weight of the shipment, in accord with the terms of the contract and Military Rate Tariff 1-B. Thereafter, by letter dated July 26, 1963, the Government demanded that United refund to it the amount of $549.28 which had been paid for the transportation of the shipment to Huntsville (JA 36a-37a). Upon United's refusal to do so, the GAO, on or about June 1, 1964, deducted that amount from accounts which the Government owed United for other unrelated transportation. (JA 11a, 25a).

On July 22, 1966 United filed suit under the Tucker Act against the United States in the United States District Court for the District of Columbia for breach of contract. Following discovery and pretrial proceedings, United and the Government filed cross motions for summary judgment. A hearing on these motions

was held before District Judge Gerhard A. Gesell on May 14, 1969, who, at the conclusion of argument, ruled that there was no genuine issue as to any material fact, and that United was entitled to judgment as a matter of law.[6/] Judgment for United in the amount of $549.28, plus interest permitted by statute, was entered on June 3, 1969. (JA 88a). On August 1, 1969, Appellant filed a Notice of Appeal in the District Court, and on October 28, 1969 the record below was filed in this Court.

6/ The Court orally stated the reasons for its ruling. However, the Government does not address itself to the Court's bench decision on opening brief. In fact, no transcript of the proceedings was ordered by Appellant pursuant to Rule 10(b) of the Federal Rules of Appellate Procedure, and it therefore is not part of the record transmitted to this Court pursuant to Rule 11. (See Gov't Br. p. 2, n 1). A transcript of the lower Court's ruling has now been prepared, and is to be filed in this Court by agreement of counsel. Briefly, the District Court held that the contract of carriage was divisible; that under the contract and the GAO's regulation, the Government's payment of United's freight charges was not a progress payment but a payment for services performed; and that the Government had no right to set off United's charges, there having been no overcharge for the transportation performed, and the set-off not having any relation to loss of the value of the shipment.

ARGUMENT

I

A Bill Of Lading Under Which Shipper Agrees To Pay For Transportation On Carrier's Delivery Of Shipment Into Storage At Destination Is A Divisible Contract, And Shipper's Set-Off Of Payment On Subsequent Loss Of Shipment In Storage Is A Breach Thereof

The Court below determined the rights of the parties under the contract of carriage, consisting of the Government bill of lading (JA 31a, 32a) and 4 C.F.R. § 52.30. Construing the terms of the bill and the Government regulations together, the District Court held that the contract of carriage was divisible as to performance and consideration, and contemplated payment of United's transportation charges upon delivery of the shipment into storage.

The determinative question on this appeal, therefore, is whether the District Court's interpretation of the contract as divisible is in accord with the law and the facts. The Government's brief is silent on this question. No allegations are made that the lower court misconstrued or misapplied the principles of law governing the divisibility of contracts. Indeed, the Government does not mention, let alone argue those principles as they apply to the facts of the case. Instead, the appeal is premised on the single contention that since the bill of lading, like all bills of lading, contemplated eventual delivery of the shipment to the ultimate consignee, the carrier's subsequent inability to so deliver it absolved the

Government of liability for the transportation charges. But this argument merely begs the question by assuming without establishing that the contract is not divisible.

A divisible contract is one contract, not several. It differs from other contracts in that upon performance by one party of each of its successive parts, the other party becomes liable for his performance of that part. 17 Am. Jur. 2d Contracts, Section 324 (p. 757). Whether or not a contract is divisible depends on the intent of the parties, which, in turn, is established by the terms of the contract, and its subject matter and surrounding circumstances. There are two basic tests in determining the divisibility of a contract, (1) severability of performance, and (2) severability of consideration. Williston defines a divisible contract to be:

> "A contract under which the whole performance is divided into two sets of partial performances, each part of each set being the agreed exchange for a corresponding part of the set of performances to be rendered by the other promisor, is called a divisible contract.
>
> * * * * *
>
> "The distinguishing mark of a divisible contract is that it admits of apportionment of the consideration on either side . . . Where such a purpose appears in the contract, or is clearly deducible therefrom, it is allowed great significance in ascertaining the intention of the parties." Williston on Contracts, Jaeger, 3rd Ed., 1962, (pp. 252, 255, footnote omitted)

Stated otherwise, where a contract embraces distinct subject matter or services that admits of being separately executed and completed, it is distributive or several as to the performance of each subject

or service. 17 Am. Jur. 2d Contracts, Section 327 p. 761. Where the consideration is single, the contract is entire. But where the consideration is expressly, or by necessary implication, apportioned, the contract is severable. 17 Am. Jur. 2d Contracts, Section 326, citing inter alia, Demott v. Jones, 64 U.S. (23 How.) 220; Washington, A & G Steam Packet Co. v. Sickles, 51 U.S. (10 How.) 419.

Under the contract in issue United was called upon to perform two distinct services. First, it was required to pack and transport the shipment from Wright-Patterson Air Force Base in Ohio, at which point the Government tendered the shipment to it, to Huntsville, Alabama. Upon the completion of this portion of the contract, the carrier was instructed by the Government to place the shipment in storage for a period of 90 days or such shorter period as the shipper demanded. Absent the Government's request for this service, the contract would have provided for delivery directly by United to the consignee, immediately upon the completion of the line-haul transportation to Huntsville, Alabama. Storage of the shipment was for the convenience and benefit of the Government, and was a separate service of indeterminable duration, the performance of which was contingent on future instructions of the shipper. In undertaking to perform it, United agreed to provide a readily distinguishable service from the transportation which had been completed.

Referring to the storage of the shipment, the Government itself reads the bill of lading as "requiring United to perform an additional service" (Gov't Br. p. 10). Nor can it deny that the consideration for the transportation portion of the contract and the subsequent storage portion of the contract was severable. The Government admits that a certificate was executed by United attesting that the shipment was delivered at Huntsville, and there placed in storage pursuant to the Government's instructions, and that the carrier undertook to assume common carrier liability for the shipment during the period of such storage (JA 21a). This certificate was executed in accord with the Government's own regulations promulgated by GAO, its agent. United fully complied with the provisions of 4 C.F.R. § 52.30, and on the strength of the certificate executed in conformity therewith, the Government paid the carrier for the transportation and accessorial charges incurred for services performed upon the storage of the shipment at the completion of the line-haul transportation. The Government paid for this service because its regulations, which have the force of a statute, provided for such payment, and further provided that compensation to the carrier for the storage of the shipment and the subsequent delivery out of storage to the consignee was to be the subject of a subsequent and wholly separate claim for payment.

Before the District Court the Government conceded that "a common carrier's liability for value of goods lost prior to delivery

is distinct from a shipper's liability for freight charges, liability for freight charges [being] controlled by the contractual provision in the bill of lading." It correctly cited Alcoa Steamship Co. v. U. S., 338 U.S. 421 (1949), Strickland Transportation Co. v. U. S., 223 F2d 466 (5th Cir., 1955), and National Trailer Convoy, Inc. v. U. S., 345 F2d 573 (Ct. Cl., 1965) for this proposition. (JA 68a). As in the lower court, however, the Government here seeks support in those decisions while ignoring the very distinction they establish. The nub of its argument is that one is dependent on the other, and that the failure to deliver, without more, relieves the shipper of its liability for freight charges.

As the Government points out in its opening brief, United relied on Alcoa, Strickland and National in the District Court, and that Court obviously viewed those decisions to be contrary to the Government's position. All three of those cases involved Tucker Act suits for recovery of transportation charges on shipments lost or destroyed during their transportation to the point of destination designated in the contract of carriage. In each case the shipment moved on a government form bill of lading substantially the same as that involved here. The first condition of the bill provided:

> "Prepayment of charges shall in no case be demanded by carrier, nor shall collection be made from consignee. On presentation to the office indicated on the face thereof of this bill of lading, properly accomplished, attached to freight voucher prepared on the authorized government form, payment will be made . . ."

As here, the GBL also contained "Instructions", Number 2 of which provided, in pertinent part, as follows:

> "The consignee on receipt of the shipment will sign the consignee's certificate on the original bill of lading and surrender the bill of lading to the last carrier. The bill of lading then becomes the evidence upon which settlement for the service will be made."

To the question: "Has the government bill provided against liability for freight charges on public goods lost at sea?" (338 U.S. at 422), the Supreme Court, in Alcoa, answered affirmatively, holding that, since the goods never arrived at destination, "the bill was not, and could not have been, filled in under the strict terms of the standard form which we have stressed, so as to be 'properly accomplished' for purposes of payment to the carrier." 338 U.S. at 427.

Alcoa, and the Strickland and National decisions applying it, are readily distinguishable from the instant case. Here, the shipment was not lost during its transport, and there was no failure of delivery by the carrier to the destination designated in the contract. To the contrary, United carried out the specific instructions on the bill of lading by delivering the shipment to Huntsville, the only destination designated on the bill, where, at the Government's direction and for its convenience, United placed the shipment in storage to await further instructions for its disposition.

In Alcoa, the Court expressly noted that "contractual pro-

visions establishing the shipper's liability for freight regardless of actual delivery have been uniformly held valid, and have become common stipulations in carriers' bills of lading." (Citing International Paper Co. v. The Gracie D. Chambers, 248 U.S. 387; Allanwilde Transport Corp. v. Vacuum Oil Co., 248 U.S. 377). It there decided the "single question" whether, under a contract of carriage for the transportation of lumber between Mobile, Alabama, and Trinidad, the Government was protected from liability for freight charges when the cargo was not delivered to the destination designated by the contract.

While the Government readily concedes the teaching of Alcoa that a shipper's liability for freight charges on a lost shipment is determined by the terms of the contract, it resolutely refuses to admit to the controlling contractual distinctions which barred recovery there but require recovery here. There the contract was entire, not divisible, the Government promising to compensate the carrier upon its undertaking to transport the cargo to the designated destination. The carrier having failed to perform its promise, the basic question framed by the Court was whether the Government's "draftsmanship" [of the GBL] succeeded in giving unequivocal notice "of its intended stipulation to condition payment upon delivery." 338 U.S. at 429. The Court held that it did because the "properly accomplished" provision was a specific condition for payment which "can only be satisfied upon delivery of the shipment to destination."

Here, under the express provisions of the contract and the Government's own regulations the parties clearly intended that payment for the performance of the transportation division of the contract was not to be conditioned on ultimate delivery to the consignee or his "proper accomplishment" of the bill of lading. By its terms Condition 1 of the GBL applies to contracts for carriage alone, in which the carrier's undertaking is fully performed immediately upon completion of the transportation, when the shipment is delivered to the consignee. It obviously is not intended to apply to a contract which, as here, called for the delivery of the shipment to a designated destination, but specifically instructed the carrier not to deliver it to the consignee. Since no delivery to the consignee was to be made under the contract, the parties obviously did not intend that the consignee was to accomplish the bill.

That this is so is clear from the Government's regulations. 4 C.F.R. § 52.30 was promulgated specifically to govern the payment of transportation and accessorial charges under contracts calling for the transportation and storage at destination of household goods shipments. Paragraph (c) provides for "the payment of transportation charges from the point of shipment to the destination storage point on household goods stored in transit for account of the motor carriers and for ultimate delivery to the consignee . . . upon completion of the transportation to the car-

rier's destination storage point and prior to ultimate delivery to the consignee." This provision constitutes a promise by the Government to pay such charges immediately upon completion of the line-haul transportation portion of the contract, subject only to the required certification which the carrier makes on, or attaches to the bill of lading. Moreover, the regulation provides that the payment of charges "accruing against the shipment after delivery into storage" are to be made by a subsequent and separate claim supported by a reference to the bill of lading and a "statement" by the consignee of the receipt of the shipment and the "loss or damage to the shipment, if any."

Thus, the regulation requires that the original bill of lading and accompanying certificate be surrendered by the carrier to the Government as support for payment of the charges upon placing the shipment in storage. Presentation of the original bill to the ultimate consignee is therefore impossible under contracts requiring storage at destination, much less that he receipt the bill. The only receipt by the ultimate consignee under these contracts is made on a separate statement which he signs on receiving the goods upon completion of the storage portion of the contract. Hence, in claiming that accomplishment of the bill was here intended to be a condition to payment, the Government asks the Court to interpret the contract to impose a requirement incapable of performance, and one at direct variance with its own regulations governing the contract in issue.

The Government says its Regulation 4 C.F.R. § 52.30, does not affect the contract but merely permits the carrier to obtain advance payment of its freight charges conditioned on completion of the storage portion of the contract. (Br. p. 13). Fundamental in contracts, of course, is the principle that a statute or law existing when an agreement is made, becomes a part of it and must be read into it as an express provision thereof, unless the agreement discloses a contrary intent. Armour Packing Co. v. United States, 209 U.S. 56; Farmers' & Merchants' Bank of Monroe, N.C. v. Federal Reserve Bank, 262 U.S. 649; Wilson v. Rousseau, 45 U.S. (4 How.) 646. The District Court construed the Regulation as part of the contract and we do not read the Government's brief as saying it erred in doing so. The language of the Regulation speaks for itself, and nothing therein purports to make the required payment on "advance" or "conditional" compensation. To the contrary, construing the Regulation in harmony with the terms of the bill of lading, the contract evidences the clear intent of the parties that payment for the line-haul transportation to Huntsville was to be made before ultimate delivery to consignee and without his accomplishment of the bill. Any other conclusion would render the contract inconsistent, ambiguous and contrary to law.

In claiming its payment to United was an "advance" payment on an unperformed, indivisible contract, the Government necessarily demands an interpretation of the agreement both con-

trary to the terms of the contract and violative of federal statute. Clause 1 of the Government bill of lading prohibits "prepayment" to the carrier, and the Supreme Court specifically held that this clause "prohibits payment in advance," Alcoa, 338 U.S. at 425. Moreover, 31 U.S.C. § 529 provides that no advance of public money shall be made in cases of contracts for the performance of any service, or the delivery of articles of any description, and further provides that payment shall not exceed the value of the services rendered.[7/] Hence, government officers may not make a prepayment or advance payment which the contractor has not earned at the time of the payment. The Government is therefore hoist on its own petard. If, as it says, 4 C.F.R. § 52.30 permits a "progress" payment on a simple, executory contract from which the Government received no consideration, that regulation is at direct odds with the contract

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7/ 31 U.S.C. § 529:

"Advances of public moneys; prohibition against

"No advance of public money shall be made in any case unless authorized by the appropriation concerned or other law. And in all cases of contracts for the performance of any service, or the delivery of articles of any description, for the use of the United States, payment shall not exceed the value of the service rendered, or of the articles delivered previously to such payment. It shall, however, be lawful, under the special direction of the President, to make such advances to the disbursing officers of the Government as may be necessary to the faithful and prompt discharge of their respective duties, and to the fulfillment of the public engagements. The President may also direct such advances as he may deem necessary and proper, to persons in the military and naval service employed on distant stations, where the discharge of the pay and emoluments to which they may be entitled cannot be regularly effected. R.S. § 3648; Aug. 2, 1946, c. 744 § 11, 60 Stat. 809."

itself, and contrary to a specific statutory prohibition imposed on its agents by Congress.

Hornbook law teaches that an agreement, the terms or performance of which are violative of statute or public policy, is illegal and void. Corollary to this is the principle that a contract which is susceptible to an interpretation rendering it valid, must be so interpreted. Faced with these truisms the Government next says that its prepayment was really not "an advance" payment at all. Rather, Appellant concedes its payment was "in effect, a progress payment for work already performed to date," and that its regulation providing for payment "comports with both Condition 1 of the bill of lading and 31 U.S.C. 529." (Br. pp. 14-15, n. 5). But this is just another way of saying the contract is divisible, and that the transportation entitling United to its charges under Condition 1 of the bill was fully performed. The Government obviously prefers it both ways. On the one hand, it contends it made only an advance payment because the delivery and accomplishment provisions of Condition 1 were not met. On the other, it insists that such payment was not an advance but the payment contemplated by the same Condition 1. Having admitted that transportation and delivery into storage was performance of the contract giving rise to payment under Condition 1 of the bill and 4 C.F.R. § 52.30, the Government cannot now complain such payment was merely an advance of consideration on an unperformed, unseverable contract.

II

The Government's Set-Off Was Unlawful And Inflicted United With Liability Exceeding That Permitted By Law And The Contract

In setting off United's transportation charges by deduction, Appellant's agent, GAO, exceeded its statutory powers, and imposed on United a liability greater than its carrier liability in violation of the terms of the contract and the Interstate Commerce Act.

GAO's power to make administrative set offs is governed by Section 322 of the Transportation Act of 1940, as amended, 49 U.S.C.A. § 66. That Section provides that payment for transportation of property "for or on behalf of the United States by any common carrier subject to the Interstate Commerce Act . . . shall be made upon presentation of bills therefor, prior to audit or settlement by the General Accounting Office" but subject to the reserved right of the government "to deduct the amount of any overcharges by any carrier from any amount subsequently found to be due such carrier." As narrowly defined by the statute, the term " 'overcharges' shall be deemed to mean charges for transportation services in excess of those applicable thereto under tariffs lawfully on file with the Interstate Commerce Commission . . . . and charges in excess of those applicable thereto under rates,

fares, and charges established pursuant to Section 22 of the Interstate Commerce Act."

The Government does not contend the transportation charges in issue exceeded the charges lawfully established by the carrier under the Interstate Commerce Act. It admits the charges published in Military Rate Tariff No. 1-B (I.C.C. No. 20) issued September 5, 1962, and effective upon acceptance by the government on November 1, 1962, are applicable to the transportation in issue. The charges in that tariff were reduced rates below United's I.C.C. tariff rates applicable to the shipping public generally, and were established by it for the sole benefit of the government pursuant to Section 22 of the Interstate Commerce Act. Under the "Governing Regulations" in Section 1 of Military Rate Tariff No. 1-B, "all rates" therein "apply on shipments when released to a value not exceeding 30¢ per pound per article." Where a value in excess of 30¢ is declared the applicable rates are those provided in the carrier's published tariffs filed with the Interstate Commerce Commission.

A motor carrier's liability under a released rates tariff is governed by Section 20(11) of Part I of the Interstate Commerce Act, 49 U.S.C. § 20(11), which is made applicable to motor carriers by Section 219 of Part II of the Act, 49 U.S.C. § 319. Section 20(11) provides that a carrier, under authorization of the Interstate Commerce Commission, may "establish and maintain rates dependent upon the value declared in writing by the shipper or agreed

upon in writing as the released value of the property, in which case such declaration of agreement shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released . . ." On a shipment made under the released liability provision of Section 20(11), the carrier agrees to perform the transportation at a reduced rate in consideration of the shipper's agreement to limit the carrier's liability to a stated amount less than the actual value of the shipment, as specified in the tariff, and declared by the shipper on the bill of lading in cents per pound per article.

Here the Government made such an agreement. The face of the bill of lading bears the endorsement: "released value not to exceed 30¢ per lb. per article." (JA 33a). The Government admits that Military Rate Tariff 1-B providing for released liability was applicable to the transportation contract in issue, and further admits that United assumed the liability imposed by the tariff and the contract of carriage, the carrier having paid the owner of the shipment, Lt. Roys, the amount of $1,926.00 for the loss of shipment of 6,420 lbs., or .30 cents per pound. Under the terms of the contract of carriage and Section 20(11) of the Interstate Commerce Act this was United's maximum lawful liability to the shipper for the loss of the shipment. Any doubt of this is dispelled by the regulations of the Interstate Commerce Commission. Had United acceded to the demand to refund the transportation

charges in issue, it would have been in clear violation of the mandatory requirements of Section 1056 of those regulations which provide in pertinent part as follows, 49 C.F.R. § 1056.9:

> "Liability of Carriers:
>
> "(a) Liability restricted. Common carriers by the motor vehicle of household goods shall not assume any liability in excess of that for which they are legally liable under their lawful bills of lading and published tariffs."

The fallacy of the Government's argument lies in its refusal to make the distinction, Alcoa requires, between the carrier's liability for the loss of goods and the shipper's liability for freight charges. Its entire opening brief consists of repeated assertions to the effect that the Government's payment of the charges on delivery into storage did not relieve United of its duty to deliver the shipment to the consignee. Compounding this error is the Government's inability to differentiate between the duty the law imposes on a carrier to transport goods to destination, and its obligation, incurred voluntarily by contract, to store the goods at destination.

The rule, universally accepted, is that where a shipment has arrived at destination, and there, at the request and for the convenience of the shipper, is allowed to remain in custody of the carrier, its liability as an insurer of the shipment ceases and becomes thereafter the liability of a warehouseman or bailee.

United Fruit Co. v. New York & B. Transp. Co., 104 Md. 567, 65 A. 415; Atchison T. & S. F. R. Co. v. Homewood, 39 Okla. 179, 134 P. 856; Railway Express Agency v. Schoen, 70 Ariz. 87, 216 P.2d 420; General American Transp. Corp. v. Indiana Harbor Belt R. Co., 191 F2d 865; cert. denied, 343 U.S. 905 (C.A. 7).[8/] The carrier can, of course, extend its common law liability as insurer by providing in its tariff or by special contract to continue custody of shipments in its capacity as a carrier for a specified time at destination. Michigan Central R. Co. v. Mark Owen & Co., 256 U.S. 427; Southern R. Co. v. Prescott, 240 U.S. 632.

Here, under Military Rate Tariff 1-B, United undertook to provide storage in transit service (JA 61a). The tariff provision did not, however, extend or expand United's liability to that of

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8/ This termination of the carrier's duty as a carrier is the same whether the shipper instructs it to hold or store a shipment before, during or after the transportation. In these circumstances as the Interstate Commerce Commission has said, ". . . the carrier, it is true, still has the goods in its custody, but the transportation which has been interrupted and interfered with by the owner can not [sic] be continued until further orders have been received from the owner. The carrier's function as a transportation agent is suspended for an indefinite, and often a long, period of time." In the Matter of Bills of Lading, 52 I.C.C. 671, 705 (1919). The Commission there held:

". . . The holding at the owner's order is not accessory to the transportation. The precise point at which the goods may be stopped and held, that is, whether in terminal yards or warehouses of the carrier, or at an intermediate point on the line of transportation is immaterial.

"From our study of the question we think that even in the absence of express stipulation the carrier's liability, under the circumstances contemplated, would be that of warehouseman, only, while the property is stopped and held in transit upon request of the shipper, owner, or party entitled to make such request."

a carrier during the period of storage, and, in the absence of special agreement between the parties, it would have been liable for loss of the shipment as a warehouseman only upon a showing of negligence by the Government. As provided in 4 C.F.R. § 52.30, however, United undertook in the Certificate it executed to extend its risk as a carrier during the period of storage, thereby expanding its liability from that of a bailee to an insurer of the shipment.[9] But, in agreeing to this, United did not thereby increase the amount of its liability for the shipment beyond that which was imposed on it by law and the contract of carriage. Under the terms of the bill of lading and Military Rate Tariff 1-B that liability was limited to the specified released value per pound.[10] United's only common carrier duty upon loss of the shipment was to satisfy this liability, and the Government could not, by set-off, or otherwise, demand a greater amount.

The Government agrees GAO's right of set-off is provided by the Interstate Commerce Act, 49 U.S.C. § 66, and that this right is limited to "overcharges." Nor does it seriously dispute the fact

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9/ The Certificate provision of 4 C.F.R. § 52.30 itself is clear evidence that the parties intended the storage of the shipment to be an additional service severable from the transportation, since under it, United undertook an obligation not otherwise imposed on a carrier by law or the Government bill of lading.

10/ The Supreme Court has held under the Interstate Commerce Act that a limitation of liability in a bill of lading covering transportation of household goods does not terminate upon completion of the transportation but continues to control during the ensuing period of storage. Cleveland and St. Louis Ry. v. Dettlebach, 239 U.S. 588.

that the set-off here did not involve an amount in excess of United's applicable Section 22 tariff rate within the restricted meaning of that term. Its only justification for GAO's deduction is that the Government has a common law right of set-off. Apart from the fact that it here purported to exercise its power of deduction under 49 U.S.C. § 66, the Government has no common law right of set-off for the simple reason that setoff did not exist at common law, but is the creature of statute. United States v. Eckfords Executors, 73 U.S. (6 Wall.) 484, 18 S. Ct. 920, Scott v. Armstrong, 146 U.S. 499. The cases relied on by the Government do not support the availability of a common law right. To the contrary, United States v. Munsey Trust Co., 332 U.S. 234, and Seaboard Surety Co. v. United States, 67 F. Supp. 967 simply hold that the Government's right of set-off is the same as that of any other creditor, and gives the Government no superior legal or equitable claim to the funds in hand. 11/

As a remedy originating in statute, it follows that the Government's right of set-off may be circumscribed by statute. That the Congress has done just that with respect to the Government's remedy against common carriers is clear from 49 U.S.C. § 66. The Government states, without elaboration, that its set-off here was of an amount " 'in excess' of that due." But the statute on its face provides that the only right "reserved to the United

11/ In Munsey involving a suit in the Court of Claims, the Court was not content to rely solely on the right of set-off available to creditors generally, but found such right to be conferred on the Comptroller General by implication from the Court of Claims' statutory power to adjudicate claims by and against the Government.

States Government" is the right "to deduct the amount of any overcharges" which, as here pertinent, are charges "in excess" of the applicable Section 22 rate.

Assuming, arguendo, 49 U.S.C. § 66 does not unequivocally proscribe the Government's right of set-off, its legislative history removes any and all doubt. Prior to 1958, the predecessor provision of 49 U.S.C. § 66, Section 322 of the Transportation Act of 1940, contained the term "overpayment" in lieu of "overcharge." In that year Congress passed Public Law 85-762 amending that provision to substitute "overcharges" for "overpayment" and to add the present language restricting the reserved right of the Government to deductions of such "overcharges" as defined therein. The GAO vigorously opposed the bill. By letter dated July 31, 1957, to the Chairman of the House Committee on Interstate and Foreign Commerce, the Comptroller General stated his objection as follows:[12/]

> "If the substitution of the 'overcharge' phrase for the word 'overpayment' is given effect it would seem that the only relief then available to the Government from excess charges not based on an "overcharge," as proposed to be defined, would be through complaint to the Interstate Commerce Commission for a determination of the lawfulness of the excessive charges paid. Even if the Government prevailed in such a proceeding before the Interstate Commerce Commission, in instances where the services were rendered by motor carriers, it would then be necessary to sue the motor carriers in a court of com-

12/ Hearings, "Recovery of Overcharges," before the Subcommittee of House Committee on Interstate and Foreign Commerce on H.R. 8742, H.R. 8743 and S. 377; 85th Congress, 2d Sess., April 30, May 1, 1958, p. 8.

> petent jurisdiction to recover the excess charges so paid, since part II of the Interstate Commerce Act does not authorize the Commission to issue an order for the payment of reparation for the exaction of unlawful charges by a motor carrier."

Similarly, the Interstate Commerce Commission viewed the amendment as narrowly circumscribing the Government's deduction power against carriers. On November 27, 1957, the Commission wrote the House Committee and described the revised language of the statute as follows:[13/]

> ". . .This substitution would make it clear that while the Government may deduct from current accounts with a carrier amounts claimed to have been paid in excess of the applicable tariff rate, it may not deduct amounts resulting from the charging of rates alleged by the Government to be unreasonable or unduly prejudicial or otherwise unlawful, although applicable because specified in the tariffs."

In the light of these emphatic views by its two most directly affected agencies, the Government is hardly persuasive in claiming the deduction here to be authorized either by 49 U.S.C. § 66 or the common law. In setting off the transportation charges in issue the Government imposed liability for the loss of the shipment in excess of that for which United was liable under the contract of carriage, and in excess of that which it lawfully could assume under the Interstate Commerce Act. In so doing, the Government acted beyond the authority granted GAO by 49 U.S.C. § 66 under which

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13/ Hearings, "Recovery of Overcharges," before the Subcommittee of House Committee on Interstate and Foreign Commerce on H.R. 8742, H.R. 8743 and S. 377; 85th Congress, 2d Sess., April 30, May 1, 1958, p. 5.

its power of administrative setoff has been narrowly limited by Congress to the deductions of claims for overcharges, i.e., those instances in which the carrier has charged an amount other than that provided in its lawfully filed and effective tariff. In no way can the language of 49 U.S.C. § 66 be read to empower the Government to exercise its post audit deduction authority to recover by administrative process what it deems to be a carrier's liability for the loss of a shipment, much less to give it authority to recover an amount in excess of the carrier's statutory and contractual liability.

CONCLUSION

For all of the foregoing reasons Appellee submits the judgment of the District Court must be affirmed, and it so prays.

Respectfully submitted,

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January 19, 1970

No. 23,589

IN THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

UNITED VAN LINES, INC.,

Plaintiff-Appellee,

v.

UNITED STATES OF AMERICA,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR THE APPELLANT

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1. United Van Lines takes the position that the contract of carriage called upon it to perform two distinct services and that this contract, along with the regulation pertaining to payment, evidences an intent of the parties to make a "divisible" contract. Since it performed the first of two services it finds in the contract of carriage, United argues that it is entitled to payment for that performance regardless of its failure to deliver the goods to the consignee. The district court, noting that this case presented a "close question" (Supp. Rec. 2), [1/] substantially adopted United's position.

1/ The district court's opinion is reproduced in an appendix to this brief, infra, pp. 1c-2c.

United itself points out that "/w/hether or not a contract is divisible depends on the intent of the parties, which, in turn, is established by the terms of the contract, and its subject matter and surrounding circumstances." (Br. 8). As our main brief demonstrates (at p. 5), the general rule of construction in the transportation field is that, unless the parties clearly express a contrary intent, bills of lading are construed to be entire rather than divisible contracts in the sense that no freight charges are payable--no matter how great a portion of the transportation service may have been performed--unless the goods are actually delivered to the consignee. Additionally, we pointed out that no clear intent to waive this rule was expressed by the bill of lading involved here, which, to the contrary, required that the goods "be delivered * * * to said consignee"--a condition that was never fulfilled.

Contracts are generally held to be "divisible" only where one party receives some benefit from partial performance by the other party. Thus, for example:

> In case of a contract naturally and accurately severable (such as a contract for the sale of a bill of goods at certain prices for each article), courts incline to hold the contract severable, and to grant a recovery for that portion of the goods actually delivered, less damages for the non-delivery of any portion not delivered. Under all ordinary circumstances this course will result in exact justice. The vendor will receive pay for his goods which the vendee has retained, and the vendee will receive compensation for any damage which he has actually suffered. If, however, it appears by express terms or by necessary implication from the terms of a contract that the intention of the parties was to make payment of the consideration depend upon delivery of all the articles, the contract will be held entire, though the consideration may be measured in units and be actually severable.

National Knitting Co. v. Bouton & Germain Co., 141 Wis. 63, 64, 123 N.W. 624 (1909), cited in 3 Williston on Contracts § 862 at p. 2416 (Rev. ed. 1936). By contrast, here the Government received no benefit from the fact that the goods were transported to the warehouse in Huntsville. What the Government contracted for in this case was delivery of the goods to Lt. Roys' home in Huntsville. Unlike a case in which partial performance has left the Government with something of value, for which is should pay (as in the example quoted above, where goods are sold and there is partial delivery), in this case partial performance by United left the Government and Lt. Roys with nothing, since Lt. Roys never received his furniture. And having received no benefit, the Government is not liable for any transportation charge.

The principle involved was expressed in Alcoa Steamship Co. v. United States, 338 U.S. 421 (1949), where the Supreme Court held that the Government was not liable under its standard bill of lading for payment for transport charges incurred where the goods were destroyed in transit, on the ground that the Government could not be liable for any transport charges "/w/ithout receipt of the goods." 338 U.S. at 427. Or, as Judge Learned Hand had stated in the decision which the Supreme Court affirmed in Alcoa, the Government "should not pay for what it does not get * * *." United States v. Alcoa Steamship Co., 175 F. 2d 661, 663 (C.A. 2, 1949). The same principle was expressed by the Fifth Circuit in Strickland Transportation Co. v. United States, 223 F. 2d 466 (C.A. 5, 1955), where the court stated that the standard Government bill of lading "cannot be 'properly accomplished'

until there has been a receipt of the shipment by the consignee at destination. Delivery of the shipment is a condition precedent to liability for freight." 223 F. 2d at 468.

In short, the entire purpose of this contract was to obtain delivery of the household goods to Lt. Roys' home. Storage "in transit" was provided for because of the possibility that the goods might arrive at Huntsville before Lt. Roys got there. But neither the Government nor Lt. Roys would receive any benefit under the contract until the goods were delivered to his home. From the point of view of the Government and Lt. Roys, it made no difference whether the goods were destroyed at the warehouse in Huntsville or on the road between Dayton and Huntsville. In either case, Lt. Roys did not receive his household goods; and, as the Supreme Court held in Alcoa, "/w/ithout receipt of the goods" there is no liability for transportation charges.

United's basic argument is that the divisibility of this contract is established by the Government's willingness to make a payment to United for its service performed to date upon the delivery of the goods to a warehouse in Huntsville. In essence, the argument is that whenever a party agrees to make a progress payment, the contract must be divisible, and the other party is entitled to keep the progress payment even though he never completes performance of the contract. This argument is erroneous. The progress payment permitted by the regulation, 4 C.F.R. 52.30, was simply a financing device, which permitted the carrier to collect reimbursement for its services performed to date, rather

than waiting for the time period that might elapse until final delivery to the consignee. At most, this progress payment constituted an acknowledgment by the Government that United had in fact incurred expenses and performed services in transporting the household goods to the warehouse in Huntsville. However, it did not constitute an acknowledgment that the Government had received any benefit by virtue of the fact that the goods arrived at the Huntsville warehouse. The benefit for which the Government contracted was delivery of the goods to Lt. Roys' home; the provision for a progress payment in no way demonstrates that delivery to the Huntsville warehouse constituted a separable benefit for which the Government should be separately liable despite the fact that Lt. Roys never received his furniture.

2. United argues that ultimate delivery to the consignee was not a condition to "proper accomplishment" of the government bill of lading because the contract

> called for the delivery of the shipment to a designated destination, but specifically instructed the carrier not to deliver it to the consignee. Since no delivery to the consignee was to be made under the contract, the parties obviously did not intend that the consignee was to accomplish the bill. (Br. p. 14)

This statement simply overlooks the fact that on the front of the bill was an acknowledgment by the carrier of receipt of the goods "to be delivered [in good order and condition] to said consignee [i.e., to Lt. Roys]." (JA 31a) The arrangement for storage in transit lends no support to the assertion that "no delivery was to be made under the contract." That arrangement was embodied

in the following typed material on the bill: "Date delivered into SIT_____" (storage in transit) and "Date delivered into Res_____" (residence), together with the notation "SIT auth at dest not to excedd (sic) 90 days." (JA 31a) Plainly, the contract still required "delivery into residence", and "storage in transit" was intended to be storage "in transit" to the ultimate delivery point--Lt. Roys' home. Even the regulation providing for a progress payment upon delivery to the warehouse for storage in transit states that such payment is made "prior to ultimate delivery to the consignee." 4 C.F.R. 52.30(c). Thus, nothing in that regulation undercuts the carrier's obligation under the bill of lading to deliver the household goods to the owner's home, after storage in transit is completed.

3. Finally, United argues that the Government's set-off of the freight charges was unlawful. This argument is threefold: 1) that the Government has no common law right of set-off; 2) that set-off was proscribed by the 1958 amendment to 49 U.S.C. 66; and 3) that the set-off in the circumstances of this case inflicted on United a liability exceeding that permitted by law and the contract. All of these contentions are without merit.

It cannot be seriously disputed that the General Accounting Office could lawfully deduct the freight charges paid United in this case from payments due on other freight bills. Such a deduction was "but the exercise of the common right, which belongs to every creditor, to apply the unappropriated moneys of his debtor, in his hands, in extinguishment of the debts due to him." Gratiot v.

United States, 40 U.S. (15 Pet.) 336, 369 (1841). No express statute is necessary to sustain this right, McKnight v. United States, 13 Ct.Cl. 292, 306, affirmed, 98 U.S. 179, 186 (1878), although it has been enacted into law, 31 U.S.C. 71. Strictly speaking, the act of deduction was not a set-off, which is exercisable in a lawsuit as a defense against a claim by one's debtor. 2/

It must also be pointed out that this right of deduction exercised by the General Accounting Office, the existence of which is not dependent upon 49 U.S.C. 66, was not proscribed by the amendment to that statute in 1958. As the legislative history quoted by United (I.C.C. letter of Nov. 27, 1959, Br. p. 27) makes clear, the amendment was enacted to prevent the Government from deducting "amounts resulting from the charging of rates alleged by the Government to be unreasonable or unduly prejudicial or otherwise unlawful, although applicable because specified in tariffs." (Emphasis supplied) The other legislative history quoted by United (Comptroller General's letter of July 31, 1957, Br. pp. 26-27) further clarifies that a purpose of that amendment was to force the General Accounting Office, prior to deducting

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2/ And while United is correct in asserting that the right of set-off "did not exist at common law, but is founded on the statute of 2 Geo. II, c. 24, s.4," United States v. Eckford, 73 U.S. (6 Wall.) 484, 488 (1867), it should also be pointed out that "* * * courts of equity from a very early day were accustomed to grant relief in that regard independently as well as in aid of statutes upon the subject." Scott v. Armstrong, 146 U.S. 499, 507 (1892).

amounts based on rates specified in I.C.C. tariff schedules, to obtain from the I.C.C. "a determination of the lawfulness" of that rate. Thus, 49 U.S.C. 66, as amended, prevents the General Accounting Office from bypassing I.C.C. procedures by making deductions on the basis of the GAO's belief that rates on file with the I.C.C. are unlawful. By contrast, here the General Accounting Office deducted all of the carrier's charges to date because they had not been earned through compliance with the terms of the government bill of lading (JA 36a-37a). Quite clearly, there was no bypassing of I.C.C. procedures; the deduction here was not made on the basis of any belief on the part of the GAO that the tariff on file with the I.C.C. was unlawful, but rather on the basis of a failure of United to comply with the contract of carriage. Congress limited the Government's right of deduction where the lawfulness of a tariff is concerned, for in forcing the General Accounting Office to go to the I.C.C. prior to making a deduction for an excessive rate, the authority of the I.C.C. over the rate structure for motor carriers in interstate commerce is maintained. But it would make no sense to cut off the Government's right to make a deduction for failure of a carrier to comply with the contract of carriage. Cutting off this right would only force the Government to go to court, resulting in the same lawsuit as we have here with the parties reversed. As the Supreme Court said in Barry v. United States, 229 U.S. 47, 53:

> * * * The liability might have been asserted by the Government in an action; but it might, as it did, charge it up as a set-off against its own liability. It would be folly to require the

Government to pay under the one contract what it must eventually recover for a breach of the other.

4. United persists in arguing that the limit under the applicable tariff schedule on its liability for the value of the household goods destroyed also limits the Government's right to make a deduction for failure to comply with the terms of the contract of carriage. Its argument, essentially, is that the amount of its total liability here cannot be increased above that specified in the tariff schedule for damage to or destruction of the goods it transports under the reduced rate.

But the sole concern in this case is whether the Government is liable to United under the terms of the bill of lading for the packing and transport charges, despite United's failure to deliver to the consignee. United's liability for destruction of the furniture is not involved. As demonstrated in our main brief (pp. 16-17), the Alcoa, Strickland and National Trailer cases establish that a common carrier's liability for the value of goods lost prior to delivery to the consignee is distinct from the shipper's liability for freight charges, the latter being controlled by the contractual terms of the bill of lading. It was the bill of lading, to which United agreed, which imposed on it the duties of packing and transporting Lt. Roys' goods to Huntsville, storing them in transit at its (or its agent's) Huntsville warehouse for not over 90 days, and delivering them to Lt. Roys' residence. And it was United's failure to perform in full these contractual duties which deprived both the Government and Lt. Roys of any benefit under the contract and which,

under the applicable rule of law, permitted the Government to exercise its right of deduction. The liability of United for the destroyed goods, whether or not limited by the applicable tariff schedule, simply has no bearing on the Government's liability as shipper, and the cases cited by United (Br. at 23) do not establish any connection between the two. Those cases involved disputes between private parties over carriers' liability for damaged or destroyed goods transported under the carriers' bills of lading. The I.C.C. report cited by United was concerned with "the efforts of the carriers in case of loss, damage, or injury to the goods transported by contract to limit its liability in accordance with the terms and conditions stated in its bill of lading." In the Matter of Bills of Lading, 52 I.C.C. 671, 678 (1919). As stated in National Trailer Convoy, Inc. v. United States, 345 F. 2d 573, 575 (Ct.Cl. 1965):

> Regardless of what the general rule may be in any particular State or under some other form of contract, the Supreme Court made plain in Alcoa * * * that under a proper interpretation of the standard form of Government bill of lading therein involved, and which is identical in all pertinent material respects with the bill of lading employed in the instant case, "* * * the United States is not liable for freight on * * * lost public property" * * *.

For the same reasons, it is clear that the Government is not liable for freight on Lt. Roys' goods.

CONCLUSION

For the reasons stated in this brief and in our main brief, the judgment of the district court should be reversed.

Respectfully submitted,

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A P P E N D I X

P R O C E E D I N G S

* * * * * * * * * * * *

THE COURT: Well, gentlemen, it is a close question. That is why we are here, I guess.

A detailed statement of the facts does not seem appropriate in view of the pretrial proceedings that have been had that put this matter into its factual context.

The Court feels that the various documents here involved, being Government documents, must be construed strictly against the Government's interest.

The Court is unable to see where the Government has a right of set-off in this situation, there having been no over-charge for the transportation that was conducted, and the set-off not having any relation to loss of the value of the shipment.

As far as the divisibility of the contract is concerned, the Court does not believe this was a progress payment but a payment for services performed to that point and that the Government has not the right to set off the amount and that it should be paid to the carrier.

Once the Government exercises the permissive right that it has under the regulation, it appears to the Court that by that action if by no other means it makes the contract divisible; and having done so, it cannot turn around and assert that it is not divisible. It becomes at least a

separable contract upon the Government's action, absent any other undertakings by the carrier which aren't present here to recognize it as something different, which would be possible under certain circumstances.

Accordingly, I grant summary judgment for the Plaintiff and deny the Government's cross-motion for summary judgment.

You may submit an order.

MR. KNEBEL: Thank you, Your Honor.

MR. DODELL: Thank you.

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CERTIFICATE OF COURT REPORTER

I, Ida Z. Watson, certify that I reported the proceedings in the above-entitled cause on May 14, 1969, and that the foregoing is the official transcript of the Court's ruling.

Ida Z. Watson